No. 22447.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. Bumb, Trustee of the Estates of Wm. H. Mecom, and Zettye M. Mecom,

Appellant,

vs.

United States of America, Internal Revenue Service,

Appellee.

On Appeal From the United States District Court for the Central District of California.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an appeal from an Order Affirming Order of Referee, entered by the United States District Court, Central District of California, September 27, 1967 [R. 81]. Appellant filed an objection to claim of United States of America, Internal Revenue Service, filed in the bankruptcy proceedings [R. 61]. Pursuant to stipulation, the Referee granted a separate hearing on the issue of whether the late-filed claim of Director of Internal Revenue was a permissible amendment [R. 64]. The Referee ruled that claims 7, 8 and 9 filed by the District Director of Internal Revenue were permissible amendments to an existing claim [R. 63-68] and,

on July 19, 1967, made an order overruling appellant's objection to the amended claims [R. 70]. Appellant filed a timely Petition for Review and the United States District Court affirmed the order of the Referee [R. 81]. Timely notice of appeal was filed by appellant on October 24, 1967. The Referee's jurisdiction was based on Section 57(f) of the Bankruptcy Act (11 U.S.C. §93), and Section 38 of the Bankruptcy Act (11 U.S.C. §66). Jurisdiction of the United States District Court was invoked pursuant to Section 39(c) of the Bankruptcy Act (11 U.S.C. §67), and this Court has jurisdiction pursuant to Sections 23 and 24 of the Bankruptcy Act (11 U.S.C. §§46, 47).

Statement of the Case.

During the course of administration of the bankruptcy an action was brought by the trustee against H & M Distributing Co., Inc., and H & M Freight Co., a fictitious name under which said corporation did business, to declare that H & M Distributing Co. was the *alter ego* of the bankrupt [R. 31]. Thereafter, on November 1, 1965, the court found that the corporation was the *alter ego* of the bankrupt and ordered all of the assets of the corporation turned over the trustee for administration [R. 43, 53].

On October 12, 1964, the First Meeting of Creditors took place, and within the six month period provided by Section 57(n) of the Bankruptcy Act (11 U.S.C. §93), the Internal Revenue Service filed a claim for Internal Revenue taxes in the sum of $6,838.41 [R. 56].

On January 24, 1966, the Internal Revenue Service filed an amended claim reducing the original amount to $6,292.82 [R. 57].

On December 22, 1966, the Internal Revenue Service filed another amended claim for Federal Income Taxes owed by the Bankrupt for the years 1963 and 1964, which claim was based primarily on the *alter ego* judgment and recovery by the trusteee [R. 58]. Thereafter, and on March 9, 1967, the Internal Revenue Service filed an additional claim consolidating those previously filed and adding thereto Excise taxes in the sum of $591.57 [R. 62]. All of these amended claims were filed subsequent to the six month period set forth in Section 57(n) of the Bankruptcy Act.

Prior to the filing of the amended claim (December 22, 1966), the trustee filed his First Report and Account and Petition to Pay Expenses of Administration, etc.; the same was heard by the Referee on December 19, 1966, and on December 23, 1966 the Referee signed Findings of Fact, Conclusions of Law, and Order *re* Net Realization and Approving First Report and Account of Trustee, etc. [R. 59]. Pursuant thereto, the trustee was ordered to pay attorney's fees, trustee's fees and certain disbursements as expenses of administration, and dividends on the filed and allowed priority claims and on the general, unsecured claims.

Objections to the amended claims were filed by the trustee based upon the late filing [R. 61].

The Referee overruled the objections of the trustee and held that they were proper amendments of the original claim although they set up new and distinct tax claims [R. 63, 70].

The Referee made this ruling upon the authority of *Menick v. Hoffman*, 205 F. 2d 365 (9th Cir., 1953), believing that he was bound by the decision in that case [R. 67, 68] [Tr. 89].

Specification of Errors Relied On.

1. The Referee's ruling that *Menick v. Hoffman, supra,* was controlling and therefore, as a matter of law, the amended claims of Internal Revenue Service were permissible, was clearly erroneous, and the District Court erred in affirming the Referee's order.

2. The Referee's Conclusion of Law that the taxes described in the amended claims were of the same basic ground for recovery and of the same generic origin was clearly erroneous, and the District Court erred in affirming the Referee's order.

3. The Referee's Conclusion of Law that the amended claims of Internal Revenue Service were not entirely new, different, separate and distinct claims was clearly erroneous, and the District Court erred in affirming the Referee's order.

4. The District Court erred in affirming the Referee's order overruling appellant's objections to the amended claims of the Internal Revenue Service.

Questions Presented.

1. Whether *Menick v. Hoffman, supra,* is controlling in the situation here presented, and required the Referee to rule as a matter of law that the late-filed claims were permissible amendments.

2. Whether the Internal Revenue Service may amend a timely filed claim subsequent to the six-month period set forth in Section 57(n) of the Bankruptcy Act where the original claim is based upon taxes owing by the bankrupt for the years 1961 and 1962, and the amended claims are for the years 1963 and 1964, and

based primarily on an *alter ego* judgment against a corporation not in bankruptcy and a recovery by the trustee of certain assets of the *alter ego* corporation.

Summary of Argument.

The Referee was mistaken when he determined that *Menick v. Hoffman, supra,* required him to overrule appellant's objections to the government's claims. The government made the new assessments which formed the basis for the amended claims by disregarding the corporate existence of H & M Distributing Co., Inc. and treating the income and expenses of the corporation as income and expenses of the bankrupt. They did this after appellant obtained a judgment of *alter ego* against the corporation and recovered certain of its assets. This basis for assessing a tax is entirely new and distinct from that which was set forth in the original proof of claim. No such situation was before the court in *Menick v. Hoffman, supra.*

The courts have laid down various guidelines to assist referees in determining whether or not an amendment is an entirely new claim which cannot be allowed if filed later than the period prescribed in Section 57(n) of the Bankruptcy Act. If the Referee had applied these guidelines, he should have sustained appellant's objection to the government's claims.

ARGUMENT.

I.

The Subject Claim Is a New Claim Filed After the Expiration of Six Months From the First Meeting of Creditors and May Not Be Allowed.

Section 57(n) of the Bankruptcy Act (11 U.S.C. §93) provides that all claims, including claims of the United States, must be filed within six months after the date of the First Meeting of Creditors, provided that the court may grant the United States a reasonable extension of time for filing such claims. No such extension was requested or granted in these proceedings. It is however, well settled that amendments to claims timely filed may be that allowed but are within the discretion of the court, as the justice of the case demands. *3 Collier on Bankruptcy,* 14th Ed., p. 182; *In re Petrich,* 43 F. 2d 435 (USDC, SD Cal., 1930).

> "Amendments subsequent to the time allowed for the filing of proofs of claims call for closer scrutiny in order to make sure that the amendment does not disguise an attempt to file an entirely new claim, in violation of the statutory time limitation." *3 Collier on Bankruptcy,* 14th Ed., p. 180.
>
> "Yet in view of the time limitation imposed by Section 57 on creditors for filing their proofs of claim, courts have been watchful not to allow a too liberal administration of the rule on amendments to nullify the legislative policy. Hence amendments offered after expiration of the statutory six-month period will be more closely scrutinized. They must be genuine amendments as aginst entirely new claims." *3 Collier on Bankruptcy,* 14th Ed., p. 186.

The appellant contends that the claim in question is a new and different claim and not a permissible amendment. It is obvious that Internal Revenue Service was aware of the legal problems involved as they designated the claim in question a "Supplemental Proof of Claim dated January 21, 1966." Obviously, Internal Revenue Service sought to avoid designating the claim as an "amendment" by using the word "supplemental", thereby hoping to tack his new claim on the prior claim which is not in question.

II.

In Determining Whether the Subject Claim Is a Permissible Amendment, the Internal Revenue Service Is to Be Treated No Different Than Any Other Creditor and Therefore Decisions Involving Non-Tax Claims Are Authoritative.

Prior to the adoption of the Chandler Act in 1938, the six month time limitation was held inapplicable to federal and state governments. Section 57(n) of the Bankruptcy Act (11 U.S.C. 93) was amended in 1938 so that governmental claims are now expressly included within the six month rule. It is clear that Congress intended the government to be treated on the same basis as other creditors and therefore cases dealing with the right of creditors to amend claims, and the reasons for permitting or denying such amendments, apply equally to the government in asserting tax claims. *Senate Report No. 1916,* 75th Cong., 3rd Sess. 5 (1938) states in part as follows: "The Committee agrees with the proposal that governmental claims should be subjected to the same requirements as other claims. . . ." See *3 Collier on Bankruptcy,* 14th Ed., p. 385; *67 Harvard Law Review 885; In re Louis J. Glazer,* 95 F. Supp. 472 (USDC, D Mass., 1951);

In re Harmack Produce Co., 44 F. Supp. 1 (USDC, SD NY, 1942).

Before examining the decisions, it should be noted that the basis for the subject claim is not merely income taxes for different years than those set forth in the original claims. The deficiency letter and the explanation of items state that the bankruptcy court determined that H & M Distributing Co., Inc. was the *alter ego* of the bankrupt and therefore the corporation was disregarded as a separate entity for tax purposes and the bankrupt's taxes for the years 1963 and 1964 were redetermined as though no corporation existed [Trustee's Ex. A]. The Preliminary Statement prepared by the revenue agent states: "The principal cause of change was the addition of income and expenses of H & M Distributing Co., Inc. to the income and expenses of the taxpayer." While appellant believes that this is not a proper ground for redetermining taxes under the Internal Revenue laws, this question is beyond the scope of the appeal as it involves the merits of the amended claims. However, when it disregarded the corporation in assessing the taxes for 1963 and 1964, the government adopted an entirely new and different basis from that which formed the basis for the original claim. The original claims were made on the theory that the bankrupt did not properly prepare his returns for the years 1961 and 1962 and therefore a deficiency was assessed. Those claims were in no way related to the existence or non-existence of the corporation. The subject claim adopts an entirely new theory, namely that in view of a court's determination that the corporation was the *alter ego* of the taxpayer, Internal Revenue Service may disregard the corporate existence and treat all income and expense of

the non-bankrupt corporation as the income and expense of the bankrupt individual.

The leading case dealing with amendments to claims is *Wheeling Valley Coal Corporation v. Mead,* 171 F. 2d 916 (4th Cir., 1949). There, a creditor filed claims against the receiver for damages caused during the receivership proceedings. After the time for filing claims had expired, the creditor filed an amended claim against the bankrupt for breach of contract. The claim was disallowed. The creditor contended that the original claim against the receiver set forth the breach of contract by the bankrupt. The court stated, at page 920:

> "A sufficient answer to this is that the specific items embraced in the original claim are so radically different from those of the amended claim as to negative any contention that they relate to the same facts and ground of liability."

Applying this rule to the facts of the subject case, it is obvious that the specific items embraced in the original claim, additional income taxes for the years 1961 and 1962, are radically different from those of the subject claim, additional taxes for the years 1963 and 1964, and the ground for liability, to wit, a disregard of the corporate entity in determining the taxes of the individual, are new and distinct from the grounds upon which the original claim was founded.

The distinguished Second Circuit Court of Appeals stated several guidelines in the case of *G. L. Miller & Co.,* 45 F. 2d 115 (2nd Cir., 1930). Speaking for L. Hand and A. Hand, Judge Swan stated at page 116:

> "[The modern decisions] permit amendments to correct defects of form, or to supply greater partic-

> ularity in the allegations of fact from which the claim arises, or to make a formal proof of claim based upon facts which, within the statutory period, had already been brought to the notice of the trustee by some informal writing or some pleading in the bankruptcy proceedings. It is quite another matter to use an 'amendment' as a device for filing after the statutory period a claim based upon a cause of action of which no notice had been given the trustee by anything previously filed. This distinction has been recognized by high authority."

Applying these guidelines to the subject claim, it is obvious that the amended claim did not purport to correct any defects of form in the original claim, nor did it purport to supply greater particularity in the allegations of fact from which the original claim arose. Likewise, no informal writing or pleading had been filed by Internal Revenue Service during the bankruptcy proceedings which gave notice to the trustee of the existence of the claim here in question. The Referee expressly found that appellant did not have actual notice of the subject claim until after it was filed on December 22, 1966 [R. 66, 67], and the trustee's testimony in support of this finding was uncontroverted [Tr. 10]. Internal Revenue Service is attempting to use an amendment as a device for filing a claim after the statutory period has elapsed. To hold that the trustee must assume such claims from the fact that the court determined an *alter ego* situation in one proceeding would require the trustee to be on notice that any creditor could assert the *alter ego* determination as the basis for a late claim. Such a result might delay indefinitely the orderly administration of the bankrupt's estate.

III.

In Determining Whether the Subject Claim Is a Permissible Amendment, Decisions Involving Claims Against Internal Revenue Service for Refund of Taxes Are Relevant.

The *Miller* case, *supra,* was followed with approval in *In re Fiegel,* 22 F. Supp. 364 (USDC, SD NY, 1937). The court, at page 365, stated as follows:

> "Amendments to claims in bankruptcy are freely allowed where the purpose is to cure defects in the claim originally filed, to supply greater particularity to the claim, or even to plead a new theory on facts already given in the claim. They are not permitted where the effort is to substitute an entirely different cause of action after the time for filing claims has expired."

The court then noted that the theory on which a claim may or may not be amended is analogous to that wherein a party makes a claim for refund of taxes, and the court states, at page 365: "A distinction quite similar is taken on amendments of claims for refund of taxes," citing *United States v. Henry Prentiss & Co.,* 288 U.S. 73. An examination of refund cases will disclose the position taken by Internal Revenue Service on amendments to claims after the statute of limitations has run; the decisions of the courts in such cases, and the rules on which the courts have relied in order to determine when a claim may be amended after the time for filing such claims has expired.

National Cattle Loan Co. v. United States, 62 F. 2d 168 (7th Cir., 1932). The taxpayer filed a claim for refund alleging that the corporation had included in its taxable income certain items that were not income and

had failed to take losses sustained and expenses incurred. After the time for filing claims had expired, the taxpayer filed an amended refund claim alleging that one of its borrowers was adjudicated a bankrupt and that the trustee had prevailed in an action to declare a loan usurious. As a result of this action, the taxpayer had never received interest income which it previously reported on the accrual basis and on which accrued and unpaid income the taxpayer had paid taxes. Likewise, the amended claim included the losses sustained as a result of the successful action brought by the trustee in bankruptcy. The Commissioner of Internal Revenue denied the amended claim for refund and the taxpayer brought suit in the district court. A demurrer was sustained and on appeal the Seventh Circuit affirmed, holding that the purported amendment setting forth the facts was not filed until the statute of limitations had run on claims for refund and the court ruled that the amendment of the claim to set forth the fact that the taxpayer had never received the income which it had previously reported, was a new claim and not a valid amendment of a previous claim. The court stated at page 170: "If an amendment is filed after the expiration of the period of limitations setting up an entirely new cause of action it is barred by the statute notwithstanding the original plea was filed in time." Thus, although the original claim was broadly stated (taxable income had included items that were not income and losses sustained and expenses incurred were not taken), the court held that the amended claim was in reality a new claim.

It is interesting to note that in the *National Cattle Loan Co.* case, *supra,* the court adopts a rule identical

to the rule found in bankruptcy cases. At page 171 the court states:

> "One object of such requirement [the filing of a claim as a prerequisite to a suit to recover taxes paid] is to advise the appropriate officials of the demand or claim intended to be asserted, so as to insure an orderly administration of the revenue . . . the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded."

Mutual Life Insurance Company of New York v. United States, 49 F. 2d 662 (Court of Claims, 1931). The taxpayer filed a claim for refund on certain grounds and after the claim was rejected by Internal Revenue Service it filed an amended claim on different grounds. The court, at page 664, stated:

> "To hold that a claim for refund made on a specific ground may, after it has been considered and rejected, be amended or enlarged so as to include an entirely different ground, and to claim a much larger refund than that asserted in the original claim, would be to permit an indefinite postponement from the limitation for bringing suit and would nullify the provisions of the statute as to the time within which claims may be filed and the time within which suit may be brought."

In *Wilson v. United States*, 246 F. Supp. 613 (ND Cal., 1965), a recent case decided by the Northern District of California, the taxpayer had formed a limited partnership in 1953. For several years the books and records of the partnership were not kept to reflect for-

mation of the limited partnership, but were instead kept on the same basis used prior to 1953. In the formation of the limited partnership, the taxpayer had given interests in the business to his children and others.

The taxpayer filed a claim for refund seeking a deduction from his income of the interests of two of his children in the limited partnership, which interests had been reported on the taxpayer's return. Thereafter, and after the statute of limitations had run on the filing of refund claims for the subject years, the taxpayer filed amended claims for refund identical to the original claims except that he asked for a credit for the amount of income that was allocated to other limited partners not specifically named in his original claim. The claims were denied and the taxpayer sued in the district court. The court reviews Section 6511 of the Internal Revenue Code of 1954 governing the amendment of claims and states at page 620 that:

> "There is nothing in the language of Section 6511 which permits the 'tacking on' of a claim filed late to a claim that was timely filed in order to give the former the lively status of the latter. Even though the 'amended claims' *involved a part of the same tax with which the timely claims were concerned, they cannot be given life by ancestry. They were filed too late and are dead.*" (Emphasis added.)

Appellant submits that the *Wilson* case is virtually identical to the subject case recognizing that, as hereinabove shown, the government is to be treated the same as any other creditor and that an analogy to refund cases is proper when determining the permissibility of

amending a claim in bankruptcy. If the position taken by Internal Revenue Service in the *Wilson* case, opposing the amended claim of the taxpayer, is sound (and this position was sustained by the District Court for the Northern District of California in 1965, *Wilson v. United States, supra*), the position taken by the appellant in this case is no different from the position taken by Internal Revenue Service in the *Wilson* case. Clearly, Internal Revenue Service could not file a claim in these proceedings for the 1963 and 1964 taxes because the period of limitations has expired. In seeking to avoid the application of a rule which Internal Revenue Service itself has adopted and successfully sustained in the courts for years, it has attempted to tack on to the allowed claim covering 1961 and 1962 a claim for different years and based upon a different theory. In the words of the court which sustained the government's position: "Even though the amended claims involved a part of the same tax with which the amended claims were concerned, they cannot be given life by ancestry. They were filed too late and are dead." *Wilson v. United States, supra.*

IV.

In Determining Whether the Subject Claim Is a Permissible Amendment, Rules of Pleading Should Be Followed.

In addition to applying rules adopted in refund cases, the courts have held that rules of pleading are helpful to determine whether or not a claim is a permissible amendment or a new claim. The leading case is *United States v. Andrews*, 302 U.S. 517, 82 L. Ed. 398, 58 S. Ct. 315 (1938), involving a tax refund claim. The taxpayer filed a claim for refund on a specific ground,

namely a loss during the taxable year due to the worthlessness of certain stocks. The claim was rejected in part and allowed in part. After the period for filing refund claims had elapsed, the taxpayer filed an amended claim asserting the taxpayer had reported dividend income which should have been reported as a capital gain. The Commissioner conceded that an overpayment had been made but denied the refund on the grounds that the amended claim was wholly unrelated to the earlier claim and was made on different grounds. The taxpayer brought suit in the Court of Claims, was successful, and the Supreme Court reversed. At page 520, the Court said: "We hold that the so-called amendment was in fact a new claim and its allowance was barred by the statutory provision limiting the time for presentation of claims for refund." The Supreme Court reviews several conflicting decisions and at page 524 lays down certain guidelines:

> "In all these cases the court found the analogies of pleading helpful in deciding whether the claim was in such form as to be subject to the proferred amendment at a time when a claim wholly new would have been barred; but the opinions point out that the analogy to pleading at law is not to be so slavishly followed as to ignore the necessities and realities of administrative procedure. Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge,

> or which in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim."

A similar rule may be found in *Wausau Sulphate Fiber Co. v. United States,* 49 F. 2d 665 (Court of Claims, 1931). The court at page 667 states:

> ". . . in determining whether it [an amended claim] operates to prevent the application of the statute of limitations we think a rule of pleading should be followed, especially as this rule is based on logic and reason. It is well settled that where a cause of action is defectively pleaded, an amendment not changing the cause of action but curing these defects does not make the cause of action subject to the statute of limitations, even though the amendment be filed after the expiration of the period thereof. On the other hand, if an amendment is filed after the expiration of the period of limitations setting up an entirely new cause of action, it is barred by the statute, notwithstanding the original plea was filed on time."

Applying these rules to the facts at hand, it is obvious that the original claim of Internal Revenue Service was based upon one fact situation and an investigation of the elements appropriate to that claim was determined affirmatively. However, the amended claim is based upon an entirely different set of facts and in-

volved matters which in the course of appellant's investigation of the original claim he would not have ascertained. Thus, the examination of the matters involved in the subject claim were not germaine to the original claim and would require an entirely new and different examination.

V.

Once a Claim Has Been Filed and Allowed It Cannot Thereafter Be Amended.

The above rule is well settled in refund cases and once a taxpayer's claim for refund has been allowed, he cannot thereafter file an amended claim. Thus, in *Heberlein Patent Corporation v. United States,* 38-1 U.S.T.C. 9648, 23 A.F.T.R. 1132 (DC NY 1938) the taxpayer filed a claim for refund which was allowed. Thereafter, the taxpayer filed an amended claim which was disallowed. In each case the basis of the refund claim was an incorrect valuation of patents for puposes of computing depreciation. The court states the rule that after a claim has been allowed in full it is no longer subject to amendment. (To the same effect see *The Henderson Company v. United States*, 36-1 U.S.T.C. 9831, 17 A.F.T.R. 1084 [DC Okla., 1936]).

In *Tuffy v. Hammer,* 145 F. 2d 447 (2nd Cir., 1944), Judge Learned Hand, at page 450, said as follows:

> "Mrs. Hammer next argues that §57, sub. n, grants priority only to claims that have been 'allowed,' and that, although in the case at bar the referees stamped the claims as 'filed,' it does not appear that they ever 'allowed' them. *In re Two*

Rivers Woodenware Co., 7 Cir., 199 F. 877, and *In re Branner*, 2 Cir., 9 F.2d 833, held that the bare 'filing' of a claim is not of itself an 'allowance'; a referee must do more than physically receive it. However, no court has ever held that an order of allowance is necessary; any act signifying that the referee has, not only actually received them, but has treated them as prima facie valid, will serve as an 'allowance.' To docket them is enough; and all the nine claims 'filed' with the first referee were docketed. It is true that the docket of the second referee does not appear in the record, and we cannot therefore tell whether he docketed the last three; yet they were 'proved' in due form and filed, and there is no evidence, as there was *In re Branner*, supra, 9 F.2d 883, that they had merely lain unnoticed in a basket. It seems to us therefore that the situation is within the general principal that when nothing appears to the contrary, official conduct is presumed to have been regular."

Appellant submits that under the above cited authorities, it is clear that a taxpayer cannot amend a claim for refund once it has been allowed by Internal Revenue Service if the time for filing claims for refund has expired, and that the same rule should be applied to the government in this case. Thus, the government's original claim, having been allowed, was no longer subject to amendment after the expiration of the six-month period.

Appellant had treated the government's original claim and first amendment thereto as allowed and was

about to pay it as a priority claim when the government filed its amended claim on December 22, 1966 [Tr. 4-6]. In fact, appellant actually prepared a check for said amount, together with an order for payment of dividends and delivered it to the Referee prior to the time when he received notice of the filing of the subject amended claim [Tr. 6-8]. It is beyond question that the government's claim in the sum of $6,292.82 had been allowed at the time the government filed an amended claim for $46,578.00 in additional taxes, and therefore the subject claim could no longer be amended. *Heberlein Patent Corporation v. United States, supra; The Henderson Company v. United States, supra.*

Such a rule is necessary for the orderly administration of tax cases and to enable taxes to be collected without prolonged delays and litigation. The same policy applies to the administration of bankruptcy cases, where the very purpose of the limitation of Section 57(n) is to speed up the closing of estates. *In re Louis J. Glazer,* 95 F. Supp. 472 (USDC. D. Mass., 1951); *In re Harmack Produce Co.,* 44 F. Supp. 1 (USDC SD NY, 1942).

VI.

The Case of Menick v. Hoffman, 205 F. 2d 365 (9th Cir., 1953) Is Not Controlling.

In the *Menick* case, Internal Revenue Service filed a timely claim for withholding taxes for the year 1950. After the six month period had expired, the Collector filed an amended claim for income taxes for the years 1944, 1945 and 1946. The trustee objected to the amended claims and his objections were sustained by the referee. Internal Revenue Service did not review

this decision, but the taxpayer sought a review and an appeal. The court at page 368 stated that the amended claim contained "only a statement of additional items amplifying a species of tax relationship and obligation that was asserted in the original claim and that continued to exist between the bankrupt and the sovereign taxing authority relative to internal revenue taxes." Likewise, it found that the subject of each claim was of the "same generic origin." In support of this ruling, the court relied on three cases.

In *United States v. Roth,* 164 F. 2d 575 (2nd Cir., 1948), a claim for taxes had been filed for the years 1939, 1942 and 1943. After the six-month period had expired, it was discovered that the year 1939 had been inserted inadvertently and that a clerical error had caused the claim to show taxes due for 1939 instead of the correct year, 1938. The court permitted the amendment and relied upon its decision in *G. L. Miller & Co., supra.* At page 576, the court states:

> "In harmony with the *Miller* case, we assume that the right to amend can go no further than to permit the bringing forward and making effective of that which in some shape was asserted in the original claim."

The court also states at page 577 that:

> "No one who knew the relations between the the parties could fail to recognize that *the proof was intended to cover the taxes for 1938.*" (Emphasis added.)

The correctness of the *Roth* decision cannot be questioned but its application to the facts at hand would seem misplaced. It cannot be seriously contended by

Internal Revenue Service that its original claim was intended to cover all taxes that might at any time, prior to the closing of the bankruptcy proceedings, be found due from the bankrupt. If such were the case, the purpose of Section 57(n) of the Bankruptcy Act (11 U.S.C. §93) would be entirely frustrated. We are dealing here not with a clerical error but with a new and distinct tax for different years and on an entirely different basis from that set forth in the original claim.

In the *Menick* case, *supra,* this Court also relied on *Industrial Commissioner of New York v. Schneider,* 162 F. 2d 847 (2nd Cir., 1947). There, the Commissioner had filed a claim for taxes which contained the following reservation: "This claim is subject to change at the completion of an audit of the books and records of the corporation." After the audit, and after the period for filing claims had expired, the Commissioner filed an amended claim for additional amounts and in part for different periods than those set forth in the original claim. Again, the Second Circuit relied on its decision in the *Miller* case, *supra,* and stated that the tax liability was a single cause of action that could not be accurately computed until an inspection of the books and records of the corporation had been completed. In the present case, Internal Revenue Service made no such broad reservation in its original proof of claim, nor does it contend that a computation of the taxes could not be accurately made until an audit of the taxpayer's books was completed.

Finally, this Court, in the *Menick* case, *supra,* relied on *Continental Motors Corporation v. Morris,* 169 F. 2d 315 (10th Cir., 1948). The *Continental* case actually supports appellant's position, as there the late-filed

amended claim grew out of the same contracts and purchase orders as did the original claim and the creditor merely attempted by his amendment to increase the amount of the claim by adding additional items of damages. The court stated at page 316:

> "We think the word claim is used in the sense of cause of action or ground for liability and that what the statute interdicts is setting up a new ground on which the claimant seeks to recover rather than an amendment of the amount for which recovery is sought."

Applying this rule to the facts in question, it is clear that the claim which was the subject of the original proof is not the same claim that is the subject of the amended proof, as it sets up a new ground on which the claimant seeks to recover, namely, the disregard of a corporate entity and the assessment of taxes based upon an *alter ego* theory.

A review of these cases shows that the foundation for the decision in *Menick v. Hoffman, supra,* is *In re G. L. Miller & Co., supra,* which appellant has heretofore discussed at length. But the test of the *Miller* case is whether the trustee was given notice of the substance of the amendment by the original claim. Applying this test to the present case, it is obvious that the amendment is not permissible.

The issues here in question were recently before Referee Ray H. Kinnison in the cases of *In re 4-D Engineering Corporation,* in Bankruptcy No. 91718-TC, and *In re Gyromill, Inc.,* in Bankruptcy No. 91717-TC (USDC, SD Cal.). In these two cases, the bankrupt had leased certain machinery on which the Los Angeles County Tax Collector had made assessments. Within

the six month period, the County filed a claim showing the assessment numbers, the assessment valuation, and the tax levied pursuant to each assessment. Nine months after the expiration of the time allowed for filing claims the County Tax Collector filed an amended claim for additional taxes based on assessments against equipment that was not referred to in its original claim. The County of Los Angeles relied heavily on *Menick v. Hoffman, supra,* the case on which the government primarily relies in this case, and contended that the original claim and the amended claims were of the same generic origin, to wit, taxes owed the County. The court held otherwise and in an excellent opinion written by Referee Kinnison (*In re 4-D Engineering Corporation* and *In re Gyromill, Inc., supra,* Memorandum Opinion, March 7, 1962), the rule of the *Menick* case was discussed. Referee Kinnison stated that the rule of the *Menick* case would permit an amendment "only if there is no change in the basic ground for recovery." He went on to state that:

> "It seems clear, when the above test is applied, Claim No. 77 cannot form the basic ground for Claims No. 116 and 117. On the contrary, it appears that they are entirely new and different claims. The property upon which the assessments were made is entirely different from the property on which Claim No. 77 is based, and is owned by entirely different lessor-owners. This distinction was recognized by the Tax Collector as he most carefully assigned different assessment numbers to the machinery owned by the different lessor-owners, even though, as his records show, all of the machinery was located at [the bankrupt's place of business], on the date of the assessment."

The cases before Referee Kinnison and the case before this Court are in most respects identical, although the taxing agencies are different. Nevertheless, the principle involved are the same and there should be no distinction between claims filed by the County Tax Collector and claims filed by the Internal Revenue Service.

In the present case, the original claim filed by the government showed assessment number D-36648/64 for income taxes due from the bankrupt for the year 1961, and assessment number D-36649/64 for income taxes due from the bankrupt for the year 1962 [R. 56, 57]. The so-called amended claim refers to different assessment numbers as well as different years. The "supplemental proof of claim" filed December 22, 1966 is based upon assessment number D-31069/66 for the year 1963 and D-31070/66 for the year 1964 [R. 58, 62]. Not only were different assessments made, as was the case in *4-D Engineering Corporation* and *Gyromill, Inc., supra*, but it further appears that the assessments for the additional taxes were not made until December 23, 1966, the day subsequent to the date on which the claims were filed [R. 62].

Appellant submits that these cases support his position herein and that the amended claims are on a different basic ground for recovery than that set out in the earlier claim. In the words of Referee Kinnison "This distinction was recognized by the Tax Collector, as he has most carefully assigned different assessment numbers . . ." (*In re 4-D Engineering Corporation,* in Bankruptcy No. 91718-TC, and *In re Gyromill, Inc.,* in Bankruptcy No. 91717-TC, Memorandum Opinion, March 7, 1962, SD Cal.).

It is the government's contention that once a claim has been filed based upon taxes owing by the bankrupt, they are permitted, under the authority of the *Menick* case, *supra,* to continue to file amended claims at any time prior to the closing of the estate, so long as the basis for the claim remains taxes owing to the government. On the other hand, appellant contends that the authorities herein cited set forth rules that govern the permissibility of amendments to be applied to all creditors without any special treatment being afforded to the government. The Referee specifically found that the basis for the amended claim was primarily the *alter ego* judgment and recovery of assets by appellant [R. 66], whereas the original claim was in no way based upon the *alter ego* judgment and in fact was filed prior to the Referee's Judgment Determining *Alter Ego.* The amended claims are based upon deficiencies assessed against William Howard Mecom primarily as a result of the adjudication in the bankruptcy court that H & M Distributing Co., Inc. was the bankrupt's *alter ego.* Whether or not this is a proper basis for filing a claim in these proceedings is beyond the scope of this review, as this question deals with the merits of the government's claim, as distinguished from the permissibility of the amendment. The question now before the Court is whether a claim for taxes which did not even exist until November 1, 1965, the date on which the Referee found that the corporation was the *alter ego* of the bankrupt [R. 43-55], is of the same generic origin, the same basic ground for recovery, and not entirely new, different, separate and distinct, from the earlier claim against the bankrupt for years other than those covered by the amended claim. Had the government sought to disregard the corporate entity and

treated the corporation and Mecom as one and the same prior to the commencement of the bankruptcy proceedings, a timely claim could have been filed and the Court would have had to determine whether disregarding the corporate entity was a proper basis for asserting a claim against the individual bankrupt. But the government did not take such action.

In this case, the government did not claim taxes against Mecom for the years 1963 and 1964 until more than thirteen months after the court had determined that the corporation was the *alter ego* of the bankrupt. The Referee did not find that H & M Distributing Co., Inc. was a non-existent entity and that the bankrupt and the corporation were one and the same. He merely determined that the assets of the corporation should be administered for the benefit of the creditors of the individual [R. 43-55]. There was no determination that the creditors of the corporation should be treated as creditors of the individual, nor has any proceeding been initiated with that objection. If the corporation's tax returns were improper the government would have claims against the corporation, but here the government has said that it will determine its claim for taxes as though the corporation never existed and pursue these claims against the individual alone.

Fundamentally, the government contends that all taxes owing to it regardless of their nature, the circumstances out of which they arose, the dates on which the liability was created, in other words, all taxes, are of the same generic origin and cannot be based upon different grounds or theories. Appellant submits that *Menick v. Hoffman, supra,* does not support such a position.

Conclusion.

The purpose of Section 57(n) is to afford creditors a reasonable time within which to file claims and at the same time permit the speedy and orderly administration of the bankrupt's estate. Without such a time limitation orderly administration would be impossible. It could be argued that creditors should be permitted to file claims and amended claims at any time prior to the closing of an estate or prior to the payment of dividends because the trustee might not be prejudiced by the late filing. However, this is not the law and appellant is aware of no case that has ever permitted a late claim on the grounds that the trustee has not been prejudiced as a result of the failure to file within the prescribed period.

If the government's position is sustained in this case, there is no reason why additional amended claims could not be filed until the estate is closed. Indeed, any creditor could filed amended claims using the *alter ego* judgment as a basis therefor without regard to the grounds for their original claims. Conceivably, every creditor of the *alter ego* corporation could file a claim in this bankrupt's estate, even though such creditors had no claims against the individual bankrupt until more than a year after the commencement of the proceedings. Such a result would be chaotic and entirely frustrate the purpose of Section 57(n).

Appellant submits that the rule of *Menick v. Hoffman, supra*, if applied here in favor of the government, would open the door to countless so-called amended claims that would create an extreme burden upon trustees in bankruptcy and virtually abrogate Section 57(n).

Appellant disagrees with the Referee, who felt himself bound by *Menick v. Hoffman, supra*, but he endorses the Referee's statement that "I don't think that the ruling in the *Menick* case should extend to these circumstances . . ." [Tr. 89].

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN J. WILSON,